



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 27, 2022

IN THE MATTER OF:

Appeal Board No. 622744

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective August 5, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by FLORENCE B DEYO INC prior to August 5, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by and on behalf of the claimant and the employer. By decision filed March 31, 2022 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the claimant and the employer

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked as a delivery driver for a petroleum company from 2018 until August 4, 2021. On August 4, 2021, the employer told the claimant that they needed to discuss his driving record. The claimant was in Vermont making a delivery on that date. While leaving the delivery site, there was an incident with the truck where a metal coupling on the pump was damaged. The claimant had had a problem with the metal coupling on the pump on the other side of his truck. On this date the claimant did a check both pre-

and post-delivery on his truck and saw no problem. The claimant had secured the hose to the clamping "ears" on the side of the truck as he always did. He shook the hose, and it was not loose. At the time of the incident, the claimant took a picture of the damage and sent it to the employer.

The employer attributed the damage to the truck, to the claimant not fastening the delivery hose properly with straps or bungee cords. The claimant had not been trained to use the straps or bungee cords. He had not been warned about not securing the hose. He had not been warned that another violation of a safety rule would lead to his discharge. The owner had been in the yard on multiple occasions when the claimant had secured the hose in the manner he did on August 4, 2021, and the owner had not corrected the claimant. The claimant had received bonuses for safety compliance after January 2021.

The claimant was fired on August 4, 2021, for the alleged safety violation of not properly securing the delivery hose.

OPINION: The credible evidence establishes that the truck which the claimant was driving was damaged on August 4, 2021, leading to his discharge. The claimant admits that he did not use a strap or bungee cord to secure the hose to the truck on August 4, 2021. However, the claimant credibly testified that he secured the hose to the truck in the same manner as he always did, that he shook it, and it was secure. The employer has no evidence that the claimant was warned that he had to secure the hose in any manner other than how he did it. Though the witnesses contend that they both warned the claimant about securing the hoses, they cannot remember the number of warnings given to the claimant, when the warnings were given, and they admit that none of the alleged warnings were reduced to writing though both claim that failing to secure the hose with a strap or bungee cord is an employer imposed safety violation. Further, we credit the claimant's testimony that the owner would have seen the claimant's truck leave the yard with his hose secured as he always did and don't credit that in the months that the claimant and the owner were in the yard together, that the owner would not have noticed the claimant's truck as the owner claims. Further, though the employer contends that they have a zero-policy for safety violations, the owner admits that while the claimant had a number of safety policy violations, he did not discharge the claimant after those incidents because the claimant was a good driver. Additionally, the owner admits that he wasn't present when the incident occurred and he, and the safety compliance manager, are only speculating that the damage was caused by the unsecured hose. Under the

circumstances of this case, we do not conclude that the last incident was due to misconduct by the claimant and that the claimant is entitled to benefits.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective August 5, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to August 5, 2021, cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER